D & D Enterprises, Inc. d/b/a Beltway Transportation Company *and* Drivers, Chauffeurs & Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, AFL–CIO. Case 5–CA–22170

October 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS COHEN AND TRUESDALE

On June 9, 1993, Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt his recommended Order.

1. The Respondent has excepted, inter alia, to the judge's findings that it violated Section 8(a)(3) by failing to reinstate economic strikers Jimmy Williams, David Johnson, and Thaddeus Randall to their former jobs and by subsequently discharging Williams and Johnson. As to the former finding of a violation, the Respondent contends that it fulfilled its legal obligation by offering to reinstate Williams, Johnson, and Randall to positions substantially equivalent to their former jobs on their return to work. As to the latter finding of a violation, the Respondent argues that it lawfully discharged Williams and Johnson after they abandoned their jobs. For the reasons set out below, we find these exceptions without merit.

The judge has fully set out the facts. In brief, the Respondent, a Maryland corporation, provides bus transportation services to agencies of the United States Government, as well as to local government and private entities in the Washington, D.C. metropolitan area. Jay Davis is the Respondent's president and Jim Deiso is its secretrary/treasurer. Since June 1990, Neal Wenger has been the Respondent's vice president of operations. The Respondent operates a system of regularly scheduled routes for its various clients. Drivers who are assigned to specific routes are ''regular'' drivers. Those who do not have assigned runs, but who fill in on an as-needed basis, are ''utility'' or ''swing'' drivers.

In midsummer 1990, the Union began organizing the Respondent's drivers. Employee Johnson, who had originally contacted the Union, talked to drivers about the Union and solicited authorization cards. Johnson also served as the Union's observer at the October 5, 1990 election. The Union won the election and was certified as the collective-bargaining representative of the unit employees.[2] Between November 1990 and August 1991, the parties held approximately 12 bargaining sessions without reaching agreement on a contract. Employees Johnson, Williams, Kitty Jordan, and Mary Walker served on the Union's negotiating committee.

On Thursday, August 8, 1991,[3] 15 of the 34 bargaining unit employees staged a strike in protest of the Respondent's failure to pay wages to drivers according to the size of the vehicles they drove.[4] The strike continued on the morning of August 9. Shortly after noon on August 9, Union Business Representative Woodward called Wenger and told him that the strikers would return to work on Monday, August 12. On the following day, August 10, Wenger met individually with certain utility drivers and offered them the regular runs previously driven by Johnson, Williams, and Randall. The utility drivers accepted the offers. The Respondent also hired one new employee, Wendall Ivey, who replaced Jordan on her regular run.

When the strikers returned to work on August 12, Williams, Johnson, Randall, and Jordan learned that they had been replaced and that their only option was to take positions as utility drivers.[5] The four opted to become utility drivers.[6] Since utility drivers do not have regularly scheduled runs, they get assignments only when regularly scheduled drivers are absent or are on vacation. Regular drivers must call the Respondent's office between 6 and 6:30 a.m. when they are going to be absent on a given day. The Respondent then assigns the vacant routes to the utility drivers on a first-come, first-served basis. Prior to the strike, util-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The unit consists of all drivers, maintenance men, and fleet maintenance chiefs employed by the Employer, but excluding all office clericals, professionals, and guards and supervisors as defined in the Act.

[3] Henceforth all dates are in 1991 unless otherwise indicated.

[4] The Respondent's failure to pay the drivers a higher wage when they drove larger buses was not alleged as an unfair labor practice and is not an issue in this case.

[5] As Davis explained to Randall, he, Randall, was replaced and, if he wanted to stay on, he could stay on as a utility driver or he could quit. Similarly, Davis told Johnson and Wenger told Williams that they had been replaced and that they could stay on as utility drivers. By letter of August 13, 1991, the Respondent formally advised the Union that Williams, Randall, Johnson, and Jordan had been reinstated, but that their job classification had been changed ''to the utility classification.''

[6] The following day, August 13, Wendell Ivey quit and the Respondent reinstated Jordan to her former job. Thus, she is not included among the discriminatees.

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ity drivers received assignments 95 percent of the time. On days when there were no assignments available, the Respondent sometimes assigned the utility drivers work around the facility so that they could make their 8 hours.

After the strike, however, the record reveals that Williams and Johnson worked only irregularly during the rest of August.[7] According to the Respondent, Williams and Johnson did not get assignments on a regular basis because they were often late for work, arriving after the available routes had been taken by other utility drivers.[8] On days when the Respondent had no work available, Williams and Johnson were sent home. In early September, Williams and Johnson began driving trucks for another company, Otis Eastern Service, in order to supplement their income. In explaining their absences to the Respondent, Williams told Wenger that he was temporarily unable to drive because of an arthritic condition, while Johnson asked for a leave of absence. When Williams ceased calling in, Wenger called Williams' residence and was informed that Williams was at work. On the morning of September 5, Davis and Deiso drove to Williams' residence to investigate his work status. When Williams left the house and drove away, they followed as Williams drove to Johnson's home, picked up Johnson, and headed for the Eastern Otis facility. When Williams and Johnson discovered that Davis and Deiso were following them and approached their car, Davis and Deiso drove off. On September 9 and 16, respectively, the Respondent sent letters of termination to Williams and Johnson. The letters stated that abandonment of work was the reason for their termination.

The judge found that the Respondent violated Section 8(a)(3) by failing to reinstate Williams, Johnson, and Randall, three of the most active union supporters, to their former positions when they returned to work on August 12. Relying on *Solar Turbines*, 302 NLRB 14 (1991), for the proposition that job vacancies created by striking employees are considered filled at the time the replacements accept the offer of permanent employment in the strikers' jobs, the judge found that the Respondent had not replaced Williams, Johnson, and Randall prior to the offer to return to work. Accordingly, the judge found that they were entitled to return to their former jobs, i.e., the regular runs to which they were assigned prior to the strike.

In reaching this conclusion, the judge also considered and rejected the Respondent's contention that its reinstatement of the three discriminatees was not unlawful because it reinstated them to substantially equivalent or better positions than those that they held before the strike. In this regard, the Respondent asserted that because of a 10-percent premium for utility work, its utility drivers earned as much as or more than the regular drivers and that they received the same benefits. The judge found, however, that the positions were not substantially equivalent because regular drivers had regular runs that guaranteed them work while utility drivers did not. We agree with the judge.

As an initial matter, we emphasize that, as found by the judge, the Respondent never lawfully replaced Williams, Johnson, and Randall during the 2-day strike.[9] Accordingly, they were entitled to return to their regular runs on the morning of August 12, and the Respondent violated Section 8(a)(3) by failing to reinstate them to their former positions.[10] We also agree with the judge, for the reasons stated by him, that the Respondent failed to reinstate them to positions substantially equivalent to their former jobs. As the judge explained, the decisive difference between their former positions as regular route drivers and their new positions as utility drivers was guaranteed employment. As regular route drivers, Williams, Johnson, and Randall were assured both steady employment and steady income. As utility drivers, however, they were guaranteed neither employment nor wages. In this regard, we observe that it is precisely this difference, lack of guaranteed work and wages, that forced Williams and Johnson to seek other work to supplement their incomes and ultimately provided the Respondent with the opportunity to terminate them for allegedly abandoning their jobs. For all these reasons, we agree with the judge that the Respondent failed to reinstate the three discriminatees to positions substantially equivalent to those they held prior to the strike.

2. We also agree with the judge that the Respondent violated Section 8(a)(3) by discharging Williams and Johnson in early September. As explained above, but for the Respondent's unlawful failure to reinstate them to their former positions, the Respondent would not have had the opportunity to terminate Williams and Johnson for allegedly abandoning their jobs. In the circumstances here, we agree with the judge that the ''Respondent unlawfully created a situation and then

[7] Randall worked as a utility driver until early September when he bid on and won a regular route.

[8] The Respondent's records support this contention. Williams testified, however, that in the weeks following the strike, he was especially careful to come to work on time because he thought that the Respondent would be watching him closely. The Respondent excepts to the judge's failure to resolve this factual issue. For the reasons explained below, we find it unnecessary to decide this issue.

[9] In adopting the judge's finding of this violation, Chairman Gould finds it unnecessary to rely on *Solar Turbines*, which dealt with the issue of whether certain conditions placed on offers of employment to strike replacements precluded their being deemed offers of permanent employment. There is no dispute over whether the offers at issue here were unconditional, but because the credited evidence shows they were made and accepted by the strike replacements *after* the Union had made an unconditional offer to return on behalf of the strikers, those offers to replacements were ineffective to bar reinstatement of the strikers to their former positions.

[10] *Laidlaw Corp.*, 171 NLRB 1366, 1368 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

took advantage of the situation it created and terminated Williams and Johnson.'' Accordingly, we adopt his finding of this 8(a)(3) violation.[11]

3. The Respondent also excepts to the judge's failure to find that Williams' and Johnson's misconduct after they were reinstated to jobs that were not substantially equivalent relieves the Respondent of its obligation to reinstate them and make them whole. We also find this exception without merit.

The actions of Williams and Johnson in obscuring the reasons for their failure to report daily at the usual reporting time for utility drivers—Williams telling the Respondent that he was too ill to work in early September, when, in fact, he had taken another job, and Johnson purporting to be on a leave of absence when, in fact, he was telephoning the Respondent's facility each day concerning the availability of driving jobs—do not rise to the level of misconduct that must be shown before the Board will take the extreme step of denying reinstatement and backpay to discriminatees otherwise entitled to a remedy. See *Geo. A. Hormel & Co.*, 301 NLRB 47 (1991) (employer seeking to be excused from reinstating and making whole a discriminatee because of misconduct that was not a factor in the employer's discriminatory action must prove that the misconduct was so flagrant as to render the employee unfit for further service or a threat to plant efficiency). Compare *Lear-Siegler Management Service*, 306 NLRB 393, 393–395 (1992) (postdischarge threat made to coemployee in order to influence his testimony in a Board proceeding sufficient to bar reinstatement). This is particularly so, as the judge noted, where the employee's misconduct is in part a response to the employer's discrimination—here, the unlawful denial of reinstatement to jobs that would have provided full-time employment. See *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965) (employee misconduct provoked by employer's unlawful conduct not a bar to reinstatement); *Earle Industries*, 315 NLRB 310, 315 (1994), and cases there cited.

In finding that Williams' and Johnson's false testimony concerning their postreinstatement work activities did not rise to the level of an abuse of the Board's processes that might otherwise justify a denial of reinstatement and backpay, we emphasize that, contrary to Member Cohen's implication, Williams and Johnson did not testify falsely at the hearing to disguise the fact that they worked elsewhere while they were still employees of the Respondent or to ''hide'' any interim earnings. On the contrary, both Williams and Johnson testified forthrightly regarding their outside work during this period and made no effort to deceive the Board regarding their interim earnings. In these circumstances, we do not find that Williams' and Johnson's conduct can be characterized as an abuse of the Board's processes that would warrant a denial of reinstatement and backpay to remedy the Respondent's own unlawful conduct. Cf. *American Navigation Co.*, 268 NLRB 426 (1983). Finally, we note that, unlike the false testimony of the Respondent's witnesses, this discredited testimony of Williams and Johnson did not bear on the merits of the unfair labor practice allegations. *Earle Industries*, supra.[12]

4. We agree with the judge, for the reasons stated by him, that the Respondent violated Section 8(a)(5) by unlawfully withdrawing recognition from the Union

[11] The Respondent excepts to the judge's finding of this violation on the ground that the judge's dismissal of the 8(a)(1) allegation alleging that the Respondent unlawfully engaged in surveillance of Williams and Johnson in early September requires a finding that their discharges were also not unlawful. In this regard, the Respondent asserts that the dismissal of the 8(a)(1) allegation underscores the Respondent's legitimate interest in determining the employment status of Williams and Johnson and that since ''the natural outgrowth'' of that inquiry was their termination, their termination must also be lawful. We disagree. The Respondent's reliance on the dismissal of this 8(a)(1) allegation in its effort to legitimize its unlawful termination of the two discriminatees is misplaced. The Respondent's surveillance of Williams and Johnson was not directly related to their union activity and therefore did not coerce them in the exercise of their Sec. 7 rights. Consequently, the judge correctly dismissed this complaint allegation. This issue, however, is altogether separate and distinct from the issue of whether the Respondent unlawfully terminated Williams and Johnson because of their union activity. Consequently, the dismissal of this 8(a)(1) allegation does not affect the judge's analysis of whether the discharge of the discriminatees was motivated by the Respondent's antiunion animus.

Member Cohen does not pass on whether the discharges of Williams and Johnson were separate 8(a)(3) violations. In his view, the Respondent's failure to reinstate Williams and Johnson to their prior jobs was unlawful. Thus, Williams and Johnson were discriminatees at all times after August 12.

[12] Member Cohen agrees with his colleagues insofar as they would not withhold reinstatement and backpay from Williams and Johnson on the basis of their lies *to the Respondent*. The Respondent discriminatorily assigned them to irregular jobs, and they sought to supplement these jobs with other employment. In order to do this, they had to deceive the Respondent in order to ''hide'' such other employment. Since the deception was the direct result of the unlawful conduct, Member Cohen would not withhold from them, *on this basis*, a full remedy. On the other hand, Member Cohen notes that the judge found that the employees perpetuated the deception by lying in the hearing in this case. There are no exceptions to this finding. In Member Cohen's view, the Board should not permit a person to misuse Board processes in this fashion and then reap a remedial benefit from those processes. Although the Supreme Court has held that the Board may *choose* to grant relief in such circumstances, it is clear from the Court's opinion that the Board is not *required* to reach this result. See *ABF Freight System v. NLRB*, 114 S.Ct. 835 (1994). In order to protect Board processes, Member Cohen would deny remedial relief to persons who deliberately lie under oath in Board proceedings, unless there are significant mitigating circumstances. Further, unlike his colleagues, Member Cohen would not distinguish between a lie concerning the issue of remedy and a lie concerning the merits of the unfair labor practice allegations. Finally, it should be noted that the mere discrediting of a witness is not necessarily a finding that the witness intentionally lied.

Based on the above, Member Cohen would toll backpay as of the time when Williams and Johnson lied at the hearing and would deny reinstatement.

on April 1, 1992, when it lacked objective evidence that the Union had lost the support of a majority of unit employees. The Respondent excepts, inter alia, to the judge's finding that it could not rely on the employee petition expressing employee disaffection from the Union as objective evidence of the Union's loss of majority support. The Respondent contends that the judge erred in finding that the petition was ''tainted'' by the Respondent's alleged unlawful conduct in refusing to reinstate the strike leaders to their former jobs and by later terminating two of them. The Respondent contends that even assuming that it engaged in such unlawful conduct, that conduct did not taint the petition because most of the employees were unaware of the unlawful conduct when they signed the petition. We disagree. As the judge found, the Respondent's conduct in refusing to reinstate the strike leaders and later terminating two of them, Williams and Johnson, was aimed at undermining employee support for the Union. As the Board stated in *Hearst Corp.*, 281 NLRB 764, 765 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988), an employer's misconduct in engaging ''in unlawful activity aimed specifically at causing employee disaffection with their union . . . will bar any reliance on an expression of disaffection by its employees, notwithstanding that some employees may profess ignorance of their employer's misconduct.'' See also *Fabric Warehouse*, 294 NLRB 189 (1989), affd. mem. 902 F.2d 28 (4th Cir. 1990).[13]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, D & D Enterprises, Inc. d/b/a Beltway Transportation Company, Forrestville, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[13] Member Cohen does not agree that unlawful conduct would necessarily taint a decertification petition if ''most'' of the employees were unaware of the conduct. In this case, however, the Respondent has not shown, or offered to show, such facts.

James P. Lewis, Esq., for the General Counsel.
Steven C. Kahn, Esq. (Pearlstein, Essex & Kahn, P.C.), of Beltsville, Maryland, for the Respondent.
Hugh J. Beins, Esq. (Beins, Axelrod, Osborne & Mooney, P.C.), for the Charging Party.

DECISION

JOHN H. WEST, Administrative Law Judge. On a charge filed August 23, 1991, as amended on April 7, 1992, by the International Brotherhood of Teamsters, Local Union No. 639, AFL–CIO (the Union), an amended complaint was issued on July 10, 1992, alleging that Respondent D & D Enterprises, Inc. d/b/a Beltway Transportation Company violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), respectively, by failing and refusing on August 12, 1991, to reinstate Jimmy Williams, David Johnson, and Thaddeus Randall to their former positions of employment,[1] and by withdrawing its recognition of the Union on April 1, 1992, and thereafter refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.[2] The Respondent denies the alleged violations of the Act.

A hearing was held in Washington, D.C., on October 26, 27, and 28 and in Arlington, Virginia, on November 9, 12, 23, and 24, 1992. On the entire record in this case, including my observation of the demeanor of the witnesses and consideration of the briefs filed by the General Counsel, Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a Maryland corporation, has been engaged in providing bus transportation service to various agencies of the United States Government throughout the greater Washington, D.C. metropolitan area. It also provides service for Prince Georges County and for private accounts. Additionally, Respondent provides charter service. The amended complaint alleges, the Respondent admits, and I find that at all times material Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

In June 1990 when Neal Wenger became Respondent's vice president of operations, Williams, who had been an assistant operations manager receiving a salary of $500 a week, was taken off salary and paid according to the run he operated. Respondent's Exhibit 9. According to Wenger's testimony, Williams was not performing any administrative functions and that was the problem.

Sometime in midsummer of 1990, a union organizing campaign of Respondent's workers occurred. Johnson contacted the Union, talked to the drivers about the Union, and had most of the drivers sign authorization cards.

An election was held on October 5, 1990, and the Union was certified later that month.[3] Johnson was the Union's observer at the election.[4] According to his testimony, just prior

[1] This allegation was amended at the hearing here to include the allegation that on September 10, 1991, Respondent unlawfully discharged Williams and Johnson.

[2] Before resting, counsel for the General Counsel amended the complaint to allege that Respondent violated Sec. 8(a)(1) of the Act on or about June 18, 1991, in an office at Respondent's facility, by its supervisor and agent Jay Davis referring to the Union in disparaging, abusive, and profane terms in the presence of members of the unit and by on or about September 12, 1991, Supervisors and Agents Davis and Jim Deiso engaged in surveillance of employees at or near the residence of one of the employees.

[3] The unit consists of the following:

> All drivers, maintenance men and fleet maintenance chiefs employed by the Employer; but excluding all office clericals, professionals, and guards and supervisors as defined by the Act.

[4] Johnson estimated that in the year before the Union was voted in he had about 40 charter runs, in addition to his other work for

to the election Wenger asked him why he was involved in the Union and he told Wenger that it was because employees had been promised that there would be some change in the pay scale and there was not. Wenger testified that he did not have a one-on-one conversation with Johnson before, during, or after an employee meeting which was held in late September 1990.

Negotiations between the Respondent and the Union commenced in November 1990. Employees Williams, Johnson Mary Walker, and Kitty Jordan were on the bargaining committee.[5] Williams testified that he, along with Johnson, attended every one of the approximately 12 bargaining sessions.[6]

On January 10, 1991, Johnson was given a 2-day suspension for failure to report or notify the Company for the second time in 2 weeks that he was not coming in. Respondent's Exhibit 30. Johnson testified that there was snow and he does not have a telephone.[7]

On January 30, 1991, Williams was terminated for allegedly abandoning an assignment and leaving a vehicle during a run. Respondent reduced the discharge to a 2-week suspension at the Union's request. Wenger testified that Williams was driving an IRS run; that Williams telephoned the Respondent indicating that he could not complete the run because his wife was taking his daughter to the hospital and he needed to go right away; that Deiso drove Davis to the vehicle at the IRS to take over the run; and that Williams was still with the vehicle. Williams' daughter's emergency room discharge instructions were introduced here. (G.C. Exh. 16.) Williams testified that he asked to be relieved when he found out that his daughter, who is a diabetic, had to be taken to the hospital.

On March 11, 1991, James Newman received a warning letter for failure to report that he was unable to report to work and he was suspended for 3 days. (R. Exh. 33.)

On April 16, 1991, Ken Hall was suspended for 2 days for arriving late at work. (R. Exh. 32.)

James Woodward, a union business representative, testified that he filed a complaint with the Wage and Hour Division of the U.S. Department of Labor in Baltimore, Maryland, on April 19, 1991, with respect to Respondent's allegedly not paying overtime and not paying the prevailing wage determination for Federal Government or federally assisted contract. The complaint (C.P. Exh. 1) specifically alleges that Respondent denied its employees the published wage determination (C.P. Exh. 2) under the Service Contract Act on contracts with Internal Revenue Service (IRS), the Nuclear Regulatory Commission (NRC), and the State Department (State).

On June 18, 1991, Williams allegedly received a written warning about (1) failing to report to work on time and (2) attendance. (R. Exh. 5.) He testified that he never saw the warning before the hearing here. Wenger testified that he gave the document to Williams on June 18, 1991. It is noted that page two of Respondent's Exhibit 11 shows that Williams missed work on June 18, 1991.

A memorandum to file dated June 19, 1991 (R. Exh. 46), refers to Johnson reporting late to work eight times during a 4-week period. Wenger testified that he never showed the memorandum to Johnson.

In July 1991 Williams was given a 3-day suspension for reporting to work late and taking days off without advance notice. (R. Exh. 26.) Respondent's Exhibit 26 is a suspension notice from Wenger to Williams dated July 3, 1991. Williams was suspended for 3 days for taking unauthorized absences. A note at the bottom of the notice indicates that Williams refused to read or take the notice. Williams testified that he was never given the document by Wenger.

By letter dated July 31, 1991, to the Union (R. Exh. 37(b)), the Regional Director for Region 5 of the Board indicated that he was not going to issue a complaint with respect to allegations that Respondent violated the Act by (1) offering wages that are less than the United States Department of

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Respondent, and in the year after the Union was voted in he had about 12 charter runs.

[5] Johnson included Carol Pagett instead of Jordan.

[6] Williams testified that Wenger threatened him three times a week about the Union; and that Wenger told him that he would lose his job because of his union activity. R. Exh. 4. Williams' August 21, 1991 affidavit to the National Labor Relations Board (the Board), contains the following:

> Many times Neal Wenger called me into his office and threatened me about the Union. He said that I would eventually lose my job because of the Union. This talk was constant, about twice a week.

Also, according to the testimony of Williams, during a conversation he was having with Deiso, who is secretary/treasurer of the Respondent, Davis, the president of Respondent, told him, Williams, that he, Davis, owned the place not the Union. Davis testified that he overheard a conversation between Williams and Deiso with the former, who apparently was off for a part of the day, telling the latter that it was the responsibility of the Company to allow him to go to work and the Company had to drive him to the State Department to handle his run; that he then told Williams that he was not running the Company and that he, Williams, was going to abide by the same rules and regulations that everyone else abided by; and that the Union was not mentioned at all during this conversation. On another occasion, according to the testimony of Williams, Davis asked him what he was doing sitting at Respondent's facility when he was not working that day, and when he told Davis that he was waiting for Johnson to go to the union hall, Davis said, ''No, you can't be in my premises because you're the union. You can't stay here. I want you out of my premises right now.'' Even before the election, according to the testimony of Williams, Deiso approached him and a fellow driver he was talking with and told Williams to get his union talk off Respondent's premises. Deiso testified that he saw Williams talking with some of the other drivers and he, Deiso, told them to go to their assignments: and that he told Williams that if he was discussing union business, it would be appreciated if he, Williams, conducted it somewhere else and at another time. Wenger testified that he never told Williams that he, Wenger, was going to kick his butt out or that he should start looking for a job somewhere else; and that he never threatened Williams in any way because of his union activities. Davis testified that he never told Williams that he, Davis, was going to kick his butt out or that he should start looking for a job somewhere else; and that he never threatened Williams in any way because of his union activities. Deiso testified that he never told Williams that he, Deiso, was going to kick his butt out; that he never told Williams to start looking for a job somewhere else; that he never threatened Williams in any way because of his union activities; and that he never had a conversation with Williams after the election in which the Union was mentioned.

[7] During his suspension, Johnson received a letter from Respondent regarding sleeping during working hours. Johnson explained that he worked the golf tournament the night before and he was picking passengers up until 12:30 a.m. and he had to be available at 6:30 a.m. the same day.

Labor pay determinations, (2) changing its past practice in assigning work, (3) removing Johnson from his route while he was active in negotiations, (4) discriminating in its assignment of charter work, (5) refusing to allow Williams to resume his normal route at State after he reported to work 2-1/2 hours after his normal starting time, (6) suspending Williams for 3 days when he did not call in and request the Employer's permission to be absent on the day he gave a statement to the Board, and (7) suspending Williams for 2 weeks because he had threatened to walk off the job and leave a company vehicle.

Respondent introduced a list of bargaining unit members as of August 7, 1991 (R. Exh. 10).

On Thursday August 8, 1991, Respondent's employees went on strike. Woodward explained that the employees had become frustrated with the collective-bargaining process and with the fact that the Union was unable to convince Respondent to pay the prevailing wage rate on the various contracts that it had with various Government agencies. The parties stipulated that the strike was an economic strike. One of the employees, Randall, testified that he, along with about 15 to 17 employees, was involved in the protest. Williams testified that the people who participated in the protest carried signs which spoke to better wages and working conditions.[8] The protest started at Respondent's facility and continued at State and IRS. Wenger testified that 15 employees participated in the strike the first day and that Respondent hired 1 new employee, Wendell Ivy, on August 8, 1991, and permanently assigned him to the IRS Bailey's Crossroads run; that it was decided that any runs left open by the strikers would be offered to any of the utility drivers who were working; that at least 1 of the contracts with a Federal Government agency (R. Exh. 17) speaks to liquidated damages if Respondent failed to adhere to its established schedules; and that that evening he attempted to make arrangements to have a private bus washing firm wash the fleet that weekend.

Davis testified that at about 6:30 p.m. on August 8, 1991, he discussed with Wenger putting every route that was normally driven by somebody on strike up for bid and offering it to any employee who was around who wanted it.

According to the testimony of Wenger, on the morning of August 9, 1991, four nonstriking utility drivers[9] were individually told, before they went out on runs, that they would be offered permanent runs left open by strikers, he was going to give them a list of those runs, and they would be able to bid on them according to seniority. Wenger testified that he did not tell all of the employees that they would bid by seniority on the runs left open by Johnson, Williams, and Randall; that he did not take this course of action because he did not think about it; and that among all of the drivers, utility drivers Jenkins and Benton were almost on the bottom of the seniority list.

Williams testified that the protest continued on August 9, 1991, first at State and then at IRS, ending about noon with some of the employees going to the union hall and arriving there about 12:30 p.m.

Woodward testified that the protest lasted 1-1/2 days and ended when an attorney at State assured him and the employees that she would look into the allegations that some of the employees made to her during the protest at State; that most of the employees returned to work on Friday, August 9, 1991, with the exception of a few, namely, the leaders, that he did not get word to until about midday; that he held a meeting with the leaders at the union offices around noon and he telephoned Wenger and told him that all employees would be back to work on Monday and the two employees who were on the wash crew, Johnson and Williams, would be available the next day, Saturday; that Wenger said that Respondent was not going to wash buses that Saturday; that when he asked Wenger if it was necessary to put it in writing, Wenger said no; and that he never used the word strike during his conversation with Wenger but rather he told Wenger that the protest was over.[10] On cross-examination Woodward testified that his above-described conversation with Wenger on August 9 was on a speaker phone. Randall testified that he was in the room with Woodward, along with Williams and Johnson, when he, Woodward, telephoned Wenger; that he could not hear Wenger's side of the conversation; that he heard Woodward say that the protest was over and that everybody would be reporting back to work on Monday; and that this telephone conversation occurred sometime in the afternoon but he could not say what time it was. Randall testified that he usually worked on the wash crew. On cross-examination, Randall testified that the conversation between Woodward and Wenger was not on the speaker phone; and that Woodward told Wenger that the wash crew was available for Saturday. Williams testified that he heard Woodward's side of his conversation with Wenger; that the telephone call took place about 1 p.m.; that he went to Respondent's facility later that day to pick up his paycheck and Davis distributed them off Respondent's premises; and that Davis did not say anything about work on Saturday or Sunday. On cross-examination, Williams testified that Woodward's conversation with Wenger was not on a speaker phone; and that during this conversation, Woodward did not say anything about State investigating the Union's allegations. Johnson testified that he was present at the union hall when Woodward telephoned Wenger and he heard Woodward's side of the conversation; that Woodward told Wenger that the employees would be reporting for work on August 12, 1991; that Woodward said that there would not be any wash crew work on Saturday; that he, Williams, Randall, Walker, Jordan, and Anthony Spears went to the Respondent's facility about 1 to 1:30 p.m. to pick up their paychecks; that Davis asked him to leave the premises and he paid the employees in the street;[11] and that he asked the person in charge of maintenance if there was going to be a wash crew on Saturday and he was told that there was not. Wenger testified that there were security concerns regarding washing the fleet that weekend and it was decided that the fleet would be washed by management. According to Wenger's testimony, Wenger and Davis were part of the wash crew that

[8] Johnson testified that the signs read: ''Unfair Labor Practices,'' ''Better Wages,'' and ''Comply with the Service Contract Act.''

[9] Jesse Benton, Hall, Danny Jenkins, and James Newman.

[10] Woodward asserted that it was not an economic strike in that the Union was protesting not being paid the prevailing wage rates and it was trying to muster some sympathy from State, IRS, and NRC.

[11] Davis testified that he did not recall asking any of the employees who went on strike to leave Respondent's premises when they came for their paycheck but rather they took their paycheck and then they left the premises without being asked to leave.

weekend along with Kushantiadi Suhana and casual washer Allen Brown. (R. Exh. 15.) Suhana, who is in charge of maintenance, testified that he and Brown did the wash crew work on August 10, 1991, and while management people might have came in and went out, he and Brown did all of the work. Suhana also testified that he did not know if there was any attempt by Respondent to use an outside contractor to wash the vehicles on August 10, 1991; and that no employee asked him about coming to work on the wash crew on August 10, 1991.

Davis testified that he told one of the striking employees at State on the morning of August 9, 1991, that Respondent was attempting to replace the driver on every route where the regular driver was on strike; and that the striking driver who he was talking to took his run back at that time. This enabled Davis to return to Respondent's facility about 10:30 a.m.

Regarding Woodward's telephone call on August 9, 1991, Wenger testified that it occurred slightly later than 1 p.m.; that Woodward stated that he was calling off the strike and the employees would be back to work on Monday; that he assumed that the strike was over as of Monday when the employees came back to work; that there was no picketing at Respondent's facility after Woodward's telephone call; that he told Woodward that the employees were welcome to any jobs that were open; that there were no contract jobs to give to any of the employees on the afternoon of August 9, 1991; that there was not any contract work on August 10 or 11, 1991; and that even after Woodward's telephone call he believed that there was a strike on August 9, 1991, because during negotiations Woodward indicated that the Union might perform a series of 1-day work stoppages and when he got the telephone call from Woodward he had no reason to believe that that would not be the case on Monday.

Davis testified that he spoke with representatives of State, IRS, and NRC on August 9, 1991, and he told them that Respondent would operate its routes and it was taking steps to bring in new employees to assure that all routes would be operated; that he spoke with representatives at State and NRC before he was told about Woodward's telephone call[12] and with IRS after; that his response was the same to the questions of the representatives from all three of the agencies; that he told the agency representatives that Respondent was going to do whatever was in its power to do to be sure that it operated the contract runs; and that he did not tell the representative from IRS that Respondent had heard anything from the union representative. Davis believed that he asked Wenger both before and after Woodward's telephone call whether the open runs were filled. He testified that he doubted that Woodward's phone call was legitimate in light of the fact that during the negotiations threats were made that the Union was going to call sporadic work stoppages on Respondent, it was going to disrupt Respondent's operation, and it was going to do everything it could to make Respondent accept the demands of the Union. Also, Davis pointed out that he had nothing in writing from Woodward.

Wenger testified that he presented General Counsel's Exhibit 9, which is a 1-page document listing 12 runs, to Jessie Benton on August 9, 1991, after 6 p.m. The document reads in part as follows:

> BECAUSE OF THE CURRENT STRIKE AGAINST BELTWAY TRANSPORTATION, THE FOLLOWING CONTRACT RUNS ARE OPEN. YOU WILL BE PERMANENTLY ASSIGNED TO THE CONTRACT RUN YOU SELECT. THE UTILITY DRIVERS SELECTING RUNS WILL DO SO BY SENIORITY.[13]

A signature appears on the line designated for signing. The IRS Poplar run is circled and it is written into the space in the following sentence: ''I WOULD LIKE TO BE PERMANENTLY ASSIGNED TO THE _____ RUN.[14] Wenger testified that Benton signed the document that evening. Benton testified that he signed the document on Friday morning, August 9, 1991, in Wenger's office; that he picked the IRS Poplar run even though other runs paid more because the van was nice and it had a nice radio;[15] and that Wenger told him that he could pick any one of the runs listed. General Counsel's Exhibit 10, which is the same form as General Counsel's Exhibit 9, is signed by Kenneth Hall. The IRS Wilson run is circled and written in on the space in the above-described sentence on the form. Wenger testified that Hall signed the form about 6 p.m. on August 9, 1991; and that Hall expressed an interest in a run at NRC, but Wenger told him that run was not open.[16] Hall testified that he did not circle the Irs Wilson run on the form and he did not write in the IRS Wilson run in the last sentence of the form; that he did sign the form; that he first saw the form on Saturday morning, August 10, 1991, at about 9 o'clock when Wenger handed him the form in the presence of Davis and Benton and Benton's son; that he did not come into work on Friday, August 9, 1991, but rather he called in and was told to continue the NRC run; that on August 10, 1991, Wenger told him that he, Wenger, had a run that he wanted Hall to drive; that when he said that he did not know the run Davis went over the run with him using a map; that he told Wenger that he did not want to do the Wilson run because he did not know it and he wanted to continue doing the NRC run he had been driving; that Wenger told him that he, Wenger, thought that it would be best for him to take the Wilson run for a while because he would be better at the Wilson run instead of the NRC run and Wenger asked him to give it a try; that he did not think that the Wilson run was circled or written on the form when he signed it; that he practiced the run on August 10, 1991, communicating by radio with Davis as he drove the route, and had difficulty both on that day and on Monday, August 12, 1991, finding the first stop; that subsequently he asked Wenger for his NRC route back but Wenger indicated that it was better if he did the Wilson run;[17] that Wenger said on August 10, 1991, that the strike was over but he did not know who was going to show up for work; that every other

[12] Davis testified that Wenger told him about 1:30 p.m. on August 9, 1991, that Woodward telephoned and said that the men would be back to work on Monday and the strike was over.

[13] Eleven runs are listed.

[14] The IRS Wilson run is also circled, but it is crossed off.

[15] Benton testified that he thought that when he returned to the facility at the end of his run that day Wenger was gone; and that he circled and crossed out ''IRS WILSON'' on the form because he mistakenly thought that it was the run with the good van.

[16] The driver who normally handled that run, Robert Newman, was on vacation that week.

[17] R. Exh. 34 shows that Hall bid on the NRC Express run on August 30, 1991.

week he complained to Wenger about the run that was assigned to him on August 10, 1991; that he was fired by Respondent for theft; that the first he knew about having an opportunity to take one of the runs left open by a striker was Saturday morning, August 10, 1991; that he did not think that he went to the office on August 9, 1991, but he was not sure; that while he could have circled the Wilson run he did not remember doing it; that the ''IRS WILSON'' written in the last sentence on the form is not his handwriting; and that he did not steal from the Respondent. General Counsel's Exhibit 11, which is the same form as General Counsel's Exhibit 9, is signed by Danny Jenkins. The State Passport run is circled on the form and written in the space in the above-described sentence on the form. Wenger testified that Jenkins first saw the form and signed the form at about 6 p.m.[18] General Counsel's Exhibit 12, which is the same form as General Counsel's Exhibit 9, is signed by James Newman. Tech World is circled on the form and written in the space in the above-described sentence on the form. Although the form is dated August 9, 1991, Wenger testified that Newman signed the form on Saturday, August 10, 1991. He gave the following testimony about the circumstances:

> A. I was at the yard on the morning of August 10th and he had come in and he was aware of this particular document and—or at least the fact that a run was going to be offered to him which had been previously, and he came in and executed this document.
>
> JUDGE WEST: For the record, how was he aware of this document?
>
> THE WITNESS: I had spoken to Mr. Newman on the morning of August 9th and had told him that runs were going to be offered to utility drivers that were not on strike and would have the opportunity to select a run that was left open by the striking employees.

James Newman testified that he first saw General Counsel's Exhibit 12 ''roughly a week after the strike close[d] maybe the middle of the week the week after the strike'': and that Wenger gave it to him saying that these routes were open to take a bid on. Wenger testified that he gave this run to James Newman on August 10, 1991, because notwithstanding Woodward's telephone call of August 9, 1991, he, Wenger, did not believe that the strike was over; and that he believed that the strike was over on Monday, August 12, 1991, when the drivers returned to work. Regarding the run circled on the above-described forms, Wenger testified that before the strike Jordan had the IRS Poplar run, Johnson had the IRS Wilson run, Williams had the State Passport run, and Tech World was an open run. Before the strike Randall had the IRS Bailey's Crossroads run. On August 12, 1991, Jordan operated this run. Wenger testified that on August 12, 1991, Jordan was a utility driver and that run, which was open, was assigned to her; that Jordan did not ask for the run; that Randall did come in that morning; and that he did not have any discussions with Jordan about this run before she arrived at work that morning. Wenger testified that General Counsel's Exhibits 9, 10, 11, and 12 were typed on the morning of August 9 but they were not put up on the board, which is the normal practice for bids, because he did not think that the runs that were left open by the strikers were going to be available to anybody that did not cross the line. Subsequently, Wenger testified that he did not think about allowing everybody on the seniority list to bid on these jobs. When asked why he replaced certain drivers notwithstanding the fact that Woodward on Friday afternoon stated that the workers would be coming back to work on Monday morning, Wenger gave the following testimony:

> A. I had implemented, and we had talked about implementing the replacement workers prior to, so we just continued to execute the program that we had laid out in anticipation that the strike wasn't going to [be] over, that we were going to have the possibility of another one or two days strike.

Subsequently, Wenger testified that he did not abort the replacement process after receiving Woodward's telephone call because he did not ''have a whole lot of confidence in the fact that what . . . Woodward told . . . [him] was going to be the course of action.'' On August 9, 1991, Deiso drove the IRS Poplar run, Eugene Hewlett, a charter driver, drove the IRS Wilson run, Karen Kanese, an office worker, drove the State Passport run, and Jim Newman, a utility driver, drove the Tech World run.

Davis testified that Wenger told him that on the night of August 9, 1991, three utility drivers were given the permanent runs that three strikers had held and that subsequently one other striker lost a permanent run; that all routes that were unoccupied by strikers were up for bid; and that the bidding on Friday night was open to all utility drivers or any new hire that was available to bid on them. Davis believed that he would have known on August 9, 1991, before he left at about 7 p.m., that certain of the utility drivers agreed to take certain of the contract runs.

On Monday, August 12, 1991, according to Woodward's testimony, several of the employees telephoned him and complained that they were not given their runs back.[19] Woodward testified that when he contacted Wenger and told him (1) the employees should be reinstated to their former positions, (2) the Union would go back to the bargaining table, and (3) they had a commitment from some people at State to help them correct the situation that they had been trying to correct in negotiations for the past year, Wenger told him to contact Respondent's outside representative.

Randall, who drove Respondent's IRS Poplar run shuttle 5 days a week for the last 8 months, was told by Davis on August 12, 1991, that he, Randall, was replaced and that if he wanted to stay on he could stay on as a utility driver, or he could quit. Randall explained that a utility driver, formerly called a swing driver, reported to work each day and if there were not enough drivers reporting that day to handle Respondent's business, then the utility driver would be utilized. Randall testified that he reported for work every day that week at 6:45 a.m. and was offered one one-half day run which he turned down. The following week he reported for work every day but he was not sent out. About 2 weeks later a run opened up and Respondent placed it on the bulletin board. Randall bid on the run, which was for the NRC, and since he had the most seniority, he got the run. On cross-

[18] Wenger went on to testify that the form was signed in front of him that evening and that it was not signed the next day.

[19] Williams testified that he went to the union hall and met with Woodward after Wenger told him that there was no work that day.

examination, Randall testified that he did not request the day off when he reported for work on August 12; that he did speak to Woodward that day about the fact that Respondent offered him a utility driver job; that when he was first hired by Respondent and he worked as a swing driver, he reported for work at 6:30 a.m.; and that the assignment of utility drivers on a particular day is on a first-in, first-out basis.

Williams, who had the State Annex Passport route 5 days a week since early spring 1991, and who worked on Respondent's wash crew on Saturdays and Sundays, was told by Wenger on August 12, 1991, when he reported for work between 6 and 6:30 a.m. that he had been replaced on his normal run and that he could stay as a utility driver.[20] Williams was not given any work by Respondent that day. He testified that he went to the union hall on the morning of August 12, 1991, and he did not know if there was a run for him to cover as a utility driver that day. Williams testified that he kept showing up for work every morning for 3 to 4 weeks and he received full days of work about three times a week.[21] He was not given weekend work during this period.[22] Williams testified that on about September 1, 1991, he attempted to call in to tell Wenger that he, Williams, was sick. According to Williams' testimony, the next day he left a note with another employee for Wenger indicating in the note that he, Williams, was sick with arthritis.[23] Williams testified that the following day he spoke with Wenger who used profanities during the conversation. According to his testimony, Williams did not telephone Wenger when he was physically well enough to drive a bus. Williams spoke to Woodward about arranging for work on a daily basis. When he obtained other employment, he did not advise Respondent. And when he received his termination letter from Respondent in mid-September he did not telephone or visit the Respondent.[24] Williams, who described himself and Johnson as the leaders of the union movement, testified that Danny Jenkins, who did not participate in the protest, took his, Williams', regular run; that Jenkins told him that Wenger telephoned him on Saturday August 10, 1991, and told him that he, Jenkins, would drive the State Passport run from then on; and that he recorded his conversation with Jenkins.[25] Williams testified that he did not report late for work on any day after the strike.

Johnson testified that for 3 weeks to a month prior to the protest he drove the run from the IRS Annex in Washington on 12th Street to Wilson Boulevard in Rosslyn, Virginia, 5 days a week; that before the protest he cleaned and washed buses at Respondent's on Saturday and Sunday; that when he arrived at work on August 12 Davis told him that he had been replaced by Kenny Hall, who had more seniority and wanted the run, and that he, Johnson, was now a utility driver;[26] and that Wenger told him, Williams, and Randall that he had no work that day. The following day Johnson also was told that there was no work. Johnson made the morning trips until August 27, 1991, when he asked Wenger for a leave of absence because he had been given only 4 days of work between August 12 and 27 and he could not take care of his family working 4 days in 2 weeks.[27] From August 27 to 30, Johnson telephoned Respondent at about 6:30 a.m. to find out if there was any work. According to Johnson's testimony, he told Wenger that if he found a full-time run for him he should call him. Johnson was advised that Davis and Deiso came by his house on September 5, 1991. About 1 week later he received a letter from Respondent informing him that he was terminated.[28] With respect to whether se-

[20] Williams testified that when he first started working at Respondent he was a swing driver which was different from a utility driver in that, with the former, if there were no runs available, the swing driver did office work or did other work around the facility. It appears that to an extent there was another difference in that when a swing driver drove someone's run for a day the swing driver received not only what the regular driver received in pay but the swing driver also received 10 percent more. Wenger testified that swing and utility are the same in that it is the same job, with the same responsibilities and same pay; that he would probably have used the terms interchangeably on his arrival at Respondent; that utility drivers are assigned on a first-in, first-out basis; that generally there are runs available every day for utility drivers who show up for work on time (6:30 a.m.); that 95 percent of the time there are runs available to the utility drivers; that if there are no runs available, the utility driver will either be given $16 reporting pay or 50 percent of the time he or she will do some work around the facility that regular run drivers usually first serve as utility drivers, on the average, for 3 to 4 months; that 6 to 10 times a year a regular run opens up on which all drivers can bid; that Respondent has, on the average, 4 or 5 utility drivers and that the benefits are the same for the regular and utility drivers. Wenger testified that three permanent swing drivers, Williams, Renee Horan, and Robert Newman, who knew all of the runs of the Company and who agreed not to bid on contract runs which opened up, were paid a 10-percent premium when they operated runs. According to Wenger the 10-percent premium was eliminated in April 1991. Subsequently, Wenger testified that the 10-percent premium was phased put in June or July 1991.

[21] On August 20, 1991, Williams asked Wenger if he, Williams, could take the following day off and he allegedly explained to Wenger that he, Williams, was going to the union hall.

[22] Subsequently, Williams testified that he thought that he worked on the wash crew one weekend after the protest. According to the testimony of Williams, after he did not get a run for 3 days, he told Wenger that he was going to the union hall and Wenger said that the Union did not run Respondent and he, Williams, could go and look for a job.

[23] The letter, which is dated September 8, 1991, is attached, along with the September 9, 1991 reply thereto, to R. Exh. 3. On cross-examination, Williams testified that with the arthritis he could not drive anything except his personal car. Wenger later testified that, in his opinion, the amount of pressure needed to apply the brakes on a minivan is no different than a personal car.

[24] On cross-examination, Williams testified that neither he nor the Union filed a charge with the Board over the termination.

[25] Counsel for Respondent listened to the tape recording at the hearing here and he cross-examined Williams about the tape recording.

[26] Johnson, who had worked for Respondent as a swing driver, testified that a utility driver was not the same thing since as a swing driver he never was sent home but rather worked regularly even when he was not given a run. Additionally, swing drivers receive 10 percent more pay then the regular driver when they take a run.

[27] The 4 days' work involved night work or one-half day work. Johnson testified that Wenger said no problem when he, Johnson, asked for the leave of absence. In Johnson's view, he went on a 30-day leave of absence after August 30, 1991. Wenger testified that Johnson did not request a leave of absence; that Johnson was not given a leave of absence; that no employee has ever asked for a leave of absence while he, Wenger, was at Respondent's; and that the Company does not have a practice or procedure on leave of absence.

[28] Johnson testified that he did not file a charge regarding his termination and the Union, to his knowledge, did not.

niority counted in assigning permanent runs, Johnson testified that sometimes it did and sometimes it did not. More specifically, Johnson testified that it all depended on how soon Respondent needed someone for the run and if there was a swing driver available who wanted the run, sometimes it would be given to the swing driver notwithstanding seniority. Johnson was not even sure if seniority was the reason that he was assigned the run he had before the above-described protest. On cross-examination, Johnson cited one example, which occurred in early 1991, of a driver who was with Respondent for 3 months, Spears, getting a State run which was one of the highest paying runs and which Johnson speculated that other drivers with more seniority wanted. According to Johnson, Spears was a union supporter. Johnson did not know whether the job was bid. He testified that he and Williams were the leaders in the union movement; that he could not understand why he, Williams, and Randall were selected to be utility drivers on August 12, 1991, since there were other drivers who participated in the protest and they were returned to their regular runs; that he and Williams had seniority over many of the drivers who protested and later got their runs back; that his run was not put up for bid on August 12, 1991; that he was present when Williams talked with Jenkins and he, Johnson, talked with Hall, who replaced him, and both of these replacement drivers said that they were called on Saturday, August 10, 1991, and were told that they were to take these runs; and that Hall and Jenkins said that they did not bid on the runs and they were not asked if they wanted them but instead they were told, ''You take this run Monday morning.'' Before the protest, Johnson worked 12 hours a day and after the protest, according to his testimony, he was lucky to get 4 hours a day. On cross-examination, Johnson testified that he did not ask for the day off on August 12 to go to the union hall but rather, only after Wenger told him, Williams, and Randall that there was no work did he leave to go to the union hall.

Wenger in his ''STRIKE LOG'' dated August 12, 1991 (R. Exh. 20), indicates, among other things, ''I ALSO TOLD WOODIE THAT THE SWING DRIVERS WERE GIVEN THE CHOICE OF ALL THE OPEN RUNS AND SELECTED THE RUN OF THEIR CHOICE.'' The exhibit indicates that Randall, Williams, and Johnson asked for the day off. Williams testified that he did not ask for the day off. Wenger testified that the request was an oral request; that Williams asked him to have the day off; that he did not talk to Johnson or Randall on August 12, 1991; that Davis spoke with them; and that Kitty Jordan was a utility driver for only 1 day because Wendell Ivy quit and Jordan was assigned back to her original run. Wenger testified that he did not recall on August 12, 1991, suggesting at any time to Williams, Johnson, and Randall that there was no work available that day; that there was work available that day but not at the time that they came in; that he did not tell them at the time that they came in that there was no work available; and that they asked for the day off prior to any discussions whether or not there was any work available. Wenger also testified that the first time Johnson, Williams, and Randall were replaced by utility drivers was August 12, 1991.

By letter to the employees dated August 12, 1991 (C.P. Exh. 4), Davis indicated as follows:

> The union has advised us they are now abandoning the strike and striking employees will be returning to work. Some employees on strike will not be able to return to their former jobs because permanent strike replacements have been hired or other employees have been permanently moved into their positions.
>
> During an economic strike, striking employees remain employees of the company with a right to reinstatement, after, as in this case, the union has requested they be allowed to now return to work.
>
> . . . .
>
> We are pleased this economic strike is over . . . .

Davis did not remember if he wrote the letter on August 12, 1991, or whether Respondent's outside representative helped him with the letter.

By letter dated August 13, 1991 (G.C. Exh. 4), Respondent's outside representative advised Woodward that Wenger passed on the inquiry regarding the status of employees who participated in the economic strike. As here pertinent, the letter indicates that Williams, Randall, Johnson, and Jordan have been reinstated and it goes on to indicate the following with respect to them:

> Since the company was faced with an economic strike and had to maintain its commitment to the U.S. Government, and did so comply with its government contracts, it was necessary to re-assign permanently to these openings other utility drivers as it had done for years or hire permanent strike replacements. These four (4) employees . . . continue to be employees of Beltway Transportation but . . . [their] job classification has changed to the utility classification.

By memorandum dated August 26, 1991, Wenger advised Williams that if he, Wenger, could not rely on Williams being on time in the morning, he, Wenger, would have to replace him with a more reliable utility driver. (R. Exh. 27.[29]) Williams testified that he neither received this document from Wenger nor did he receive two other memorandums from Wenger regarding starting time, which memorandums are dated August 21 and September 9, 1990, and which were received here, respectively, as Respondent's Exhibits 24 and 25.

The last negotiation session was held on August 26, 1991. This was the only session held after the strike. Woodward testified that the Union wanted the wages to be determined by whether a light, medium, or heavy vehicle was utilized on the run; and that the Respondent was offering just one wage rate, the light vehicle wage rate, to the drivers of all of the vehicles.[30] No date for the next meeting was set at

[29] Respondent introduced a similar memorandum of the same date for Johnson, R. Exh. 8. Johnson testified that he was not aware of this and two other memorandums that Respondent introduced, namely, R. Exhs. 6 and 7. The former, which refers to Johnson's alleged tardiness, is dated November 30, 1990, and the latter is dated August 22, 1991. The latter ends with: ''IF YOU DO NOT CALL THIS OFFICE IN A TIMELY MANNER TO LET US KNOW THAT YOU ARE UNABLE TO REPORT TO WORK, YOUR ASSOCIATION WITH BELTWAY TRANSPORTATION WILL BE TERMINATED.''

[30] Woodward testified that at some point in negotiations he was advised that Respondent does have some form of seniority but several employees complained during negotiations that whether Re-

this session. Woodward testified that between August 1991 and March 27, 1992, he spoke with Wenger several times over the telephone requesting a resumption of negotiations, and that he also spoke to Respondent's outside representative. He could not recall the dates of his conversations with Wenger and he could not recall how many times they spoke. Williams testified that it was his understanding that Respondent's outside representative was going to telephone Woodward about the next meeting. Wenger testified that Respondent's outside representative was the chief negotiator and spokesperson for the Respondent up until the time that the unfair labor practice complaint was issued, and that the last meeting was left essentially in a deadlock. Wenger denied having any contact with the Union between the time of the last meeting and the end of March 1992. Davis testified that he did not have any contact with the Union after the end of August 1991. Deiso testified that he never heard from the Union between the last negotiation meeting and the end of March 1992.

By memorandum dated August 26, 1991 (R. Exh. 27), which is to Williams, Wenger stressed the importance of promptness and daily attendance. Williams testified that he never saw this memorandum before the trial here. Johnson received a written warning on this date. Wenger testified that Johnson came in after 6:30 almost every morning after August 12, 1991. (R. Exh. 29.)

According to a bid sheet introduced by Wenger (R. Exh. 34), Randall was awarded the NRC express run on August 30, 1991. Wenger testified that Randall began the run on September 9, 1991. It was explained by Wenger that if a regular run opens up, he puts a bid sheet up on the bulletin board which describes the run, the hours, the pay, and the length of time for lunch and asks the drivers to sign up for the run if they are interested. The bid is usually posted for 5 working days. Wenger testified that Williams and Johnson had greater seniority than Randall and there was no reason why Williams or Johnson would not have gotten the job over Randall.

One morning in September 1991, Davis and Deiso followed Williams and Johnson as they left their residences. Davis and Deiso broke off the surveillance when it became clear that Williams and Johnson were aware of their presence. Williams and Johnson assertedly were on the way to the union hall to see if they could get a daily job. Both Williams and Johnson testified about this incident. Davis testified that he telephoned Williams' house a number of times in early September 1991 to find out where Williams was since he was not coming to work and he, Davis, was told by Williams' wife that Williams went to work; that before taking any disciplinary action against Williams he wanted to make sure that he was not doing anything rash; that he and Deiso followed Williams to find out if he was working somewhere else; and that Williams and Johnson saw him and Deiso.

Johnson was terminated by letter dated September 9, 1991. (R. Exh. 31.) Wenger testified that the Union did not protest the termination nor was a charge filed over the termination.[31]

As noted above, Williams was terminated by Respondent by letter dated September 16, 1991. (R. Exh. 28.[32])

The General Counsel introduced the records of Respondent's runs from July 1 through September 30, 1991 (G.C. Exh. 8).

By letter dated November 1, 1991, to the Union (R. Exh. 38), the Regional Director for Region 5 of the Board indicated that further proceedings were not warranted and he would not issue a complaint on the allegations that Beltway violated the Act by (1) causing an assault and battery on a representative of the Union, (2) terminating the employment of employee Walker, (3) changing its health care insurance on September 1, 1992, after it met and bargained with the Union about the proposed change, (4) increasing the hourly rate paid employees who perform the NRC run pursuant to a wage determination that was issued by the United States Department of Labor, and (5) refusing to honor the established seniority bid system with regard to the assignment of weekend work. Regarding the last above-described allegation, the Regional Director concluded that the Employer had not altered how it assigns weekend work to its employees.

Respondent introduced a bid sheet dated November 1, 1991, for a contract run which opened up and was taken by Anthony Spears, who had less seniority than Williams and Johnson. (R. Exh. 43(a).[33]) According to Wenger's testimony, Dan Jenkins, who has less seniority than Williams and Johnson, successfully bid on another contract run which opened up in November 1991. Wenger testified that he could not find the bid sheet for that run or another contract run which opened up after the strike, namely, the Wilson run which was taken over by Hezlep, who has less seniority than Williams and Johnson.

Wenger testified that in the fall of 1991 individual employees initiated conversations with him regarding the Union. Assertedly, Robert Newman told Wenger that he, Newman, did not want the Union to represent him. According to Wenger's testimony, Eugene Hewlett, a full-time charter driver, gave Wenger a petition dated November 25, 1991, signed by 17 employees, as more fully described below, which petition indicates that the signers did not want the Union to represent them.[34] Wenger testified that he had conversations similar to the one he had with Robert Newman,

spondent used seniority depended on who the employee involved was. According to Woodward's testimony, Wenger explained during negotiations that on runs which are made under contract with a Government agency, Respondent puts up bids on the board and the runs are awarded by seniority, and that charter runs are offered to drivers in accordance with a seniority program.

[31] Wenger testified that he fired Nagel Jackson in September or October 1990 for attendance-related problems.

[32] Respondent introduced a copy of a payroll record of Otis Eastern Service, Inc., R. Exh. 39, which shows, as here pertinent, that for the 1-week payroll period ending September 8, 1991, Williams earned over $800 in regular and overtime pay and for the week ending September 15, 1991, Williams earned over $1200 in regular and overtime pay. The $16.25 an hour that Williams earned at Otis was almost twice what he was earning at Respondent.

[33] Respondent also introduced four other bid sheets on contract runs which opened up in 1992, R. Exhs. 43(b), (c), (d), and (e).

[34] Suhana testified that he typed the petition on one of the typewriters which is located in the upstairs office area of Respondent's facility: that he did not have the Company's permission to use the typewriter; that there was no one there at the time; that he did not know if the Company was aware that he used the typewriter; and that after the petition was signed, he hand delivered it to Wenger.

with all of the employees who signed the petition prior to the date of the petition.[35]

Hewlett testified that he signed the petition in Suhana's office during the evening when he, Hewlett, came into the facility to change vehicles. Benton testified that one afternoon when he came into the breakroom after work the petition was on the breakroom coffee table and Suhana told him to check it out. Larry Brown testified that when he came back to the facility from his run, Suhana asked him to look at the petition and told him that he could sign it if he wanted to ''rule out the union.'' Christopher Morris testified that Suhana showed him the petition when he, Morris, was in Suhana's office, along with Hewlett. Willy Latimor testified that when he returned from a job Suhana told him that the petition was laying on his desk and he could sign it if he wanted to. Horan (now Scarano) testified that Suhana told her about the petition. On his return to the facility one evening, Larry Holmes was told by Suhana about the petition. He signed it in the drivers' area. Robert Newman testified that Hewlett asked him if he was interested in signing a petition to oust the Union; that he signed the petition where the buses are parked at Respondent's facility at about 6 a.m. Hezlep testified that Suhana gave him the petition and he signed it in Suhana's office. James Newman testified that one evening when he came in from his job to Respondent's downstairs office, Suhana handed him the petition saying that he could sign it or not sign it; and that he had also signed the other petition on a yellow sheet of paper which was circulated earlier by Hewlett. Mohammed Azam testified that sometime after the strike Suhana asked him to sign a petition to vote the Union out; and that he signed the petition while he was doing his regular route and was on working time. James Freeman testified that one evening when he returned from his run Suhana asked him if he wanted the Union to represent him and he told Suhana no and signed a petition to that effect.

[35] Hewlett testified that he told Wenger before and after the strike that he, Hewlett, did not need to give his money to the Union. Benton testified that after the strike he told Wenger that he, Benton, thought that the Company was too small an outfit to be harassed by a union. Brown testified that he told Wenger after the strike, on August 12, 1991, that he signed the petition because he needed steady work to pay his bills; and that Wenger said that he did not want to discuss the matter. Brown signed the introduced petition on November 26, 1991. There was another petition circulated prior to the one introduced here but apparently it was discarded when Suhana drafted the petition received here. Christopher Morris testified that after the strike he approached Wenger about the petition; that Wenger said that he should do what he had to do; and that he told Wenger that the Company was too small and it would not be able to afford to have a union. Renee Horan (now Scarano) testified that she told Wenger that she had no intention of going out for the Union because she did not believe in it; and that she also told him that the Union did not keep the employees well informed. Thomas Hezlep testified that he told Wenger that he, Hezlep, was not a union man. James Newman testified that he expressed his discontent to Wenger over the fact that he, Newman, could not vote in the union election because of his hire date. Joseph Toney testified that after the strike he told Wenger that he, Toney, did not need the Union and he was against it and if he was forced to join the Union, he would quit; and that Wenger said that he, Toney, was not going anywhere. James Freeman testified that he probably did tell Wenger that he, Freeman, was against the Union.

According to Wenger's testimony, in early 1992 Suhana told him that a union meeting had been called and nobody showed up. In his affidavit, Wenger indicated that an employee informed him that a union meeting had been called for early 1992, and that only he, the employee, Williams, and Johnson showed up.

By letter dated March 27, 1992 (G.C. Exh. 2), the Respondent was advised by the Union that it wanted to resume negotiations as soon as possible. The letter went on to request specified bargaining unit information.

By letter dated April 1, 1992 (G.C. Exh. 3), the Respondent informed the Union as follows:

> We have extensive ''objective evidence'' that Teamsters Local Union #639 no longer represents a majority of the employees at Beltway Transportation Service. Consequently; due to our ''good faith doubt'' we are hereby withdrawing recognition of your union and cannot legally, and will not, under the circumstances, meet with your union.

Wenger testified that the decision to withdraw recognition was based on the fact that the Respondent had not had any meetings, conversations, or contact with the Union for 8 months and on the conversations he had with employees.

By letter dated April 15, 1992 (G.C. Exh. 5), to the Board, Respondent's outside representative specified nine factors on which Respondent relied in withdrawing recognition from the Union.

By letter dated May 20, 1992 (G.C. Exh. 6), to the Board, Respondent's outside representative specified a 10th factor, namely, a petition allegedly signed and dated by 17 of the employees at Respondent's who indicated that they did not want the Union to represent them.[36] The petition is attached

[36] The following employees identified their own signatures: Suhana, Hewlett, Benton, Brown, Morris, Horan (now Scarano), Holmes, Robert Newman, Hezlep, James Newman, Azam, Toney, and Freeman. Suhana testified that the following employees of Respondent signed the petition in his presence: Joseph Bell and Carol Rosetta, who resigned from the Company in September 1992. Suhana and Robert Newman testified that they were aware when they signed the petition that Williams and Johnson were not reinstated to their prestrike jobs and subsequently terminated. On the other hand, the following employees testified that they did not know this when they signed the petition: Benton, Brown, Latimor, Scarano, Holmes, Hezlep, James Newman, Azam (he pointed out that he heard from other employees that Williams and Johnson had been terminated but he did not have any direct knowledge), Toney, and Freeman. Hewlett appears to testify that he was aware that Respondent had terminated Williams and Johnson when he signed the petition. Morris testified that he was aware at the time that after the strike Williams and Johnson were not reinstated to their prestrike jobs but he was not sure if he knew that they were terminated at the time. Scarano, a charter driver, testified that she did not see Williams and Johnson around the yard after the strike. And the following employees testified that they did not change their mind after signing the petition: Suhana, Hewlett, Benton, Brown, Morris, Latimor, Scarano, Holmes, Robert Newman, Hezlep, James Newman, Azam, Toney, and Freeman. Hewlett testified that Johnson and Williams were the union leaders. Brown testified that Williams, Johnson, and Randall were the most active employees for the Union. Morris testified that it was common knowledge that Williams and Johnson were the leaders for the Union. Latimor testified that he knew that Williams and Johnson were the leaders for the Union. James Newman testified that Williams and Johnson were active in

to the letter. The dates for the signatures on the petition are November 25–27, 1991. Wenger testified that he crossed off the names of Bell, Freeman, and Hall from the petition since he did not believe that they would be counted in that Hall was terminated March 1991, and Bell and Freeman had been laid off in late August 1991.[37] Wenger authenticated the signatures on the petition using payroll sheets.[38] He testified that he had conversations with the individual employees who signed between the time they signed the petition and April 1, 1992.[39] Assertedly, the employees initiated the conversations. Wenger also testified that while he had the petition in his possession from the end of November 1991 he did not mention it to or give a copy of it to Respondent's outside representative until late April or early May 1992. According to Wenger's testimony, it was common knowledge among the employees that Johnson and Williams were leaders for the Union and he, Wenger, suspected that it was common knowledge among the employees that Williams and Johnson were replaced.

Analysis

Paragraph 10 of the complaint, as it read originally, alleges that on or about August 12, 1991, Respondent failed or refused to reinstate Williams, Johnson, and Randall to their former positions of employment. On brief, the General Counsel contends that the replacement of these striking employees occurred after the Union had made an unqualified offer to return on their behalf, which offer was made before their replacements had accepted the positions; that Williams and Johnson had more seniority that Jordan who was reinstated on August 12, 1991, when her replacement quit; and that Williams and Johnson should have been accorded the opportunity to bid on the August 30, 1991 posting. The Union, on brief, argues that even accepting Wenger's testimony, he did not offer the jobs of Williams, Johnson, and Randall to the other employees until about 5 hours after the Union made an unconditional offer to return to work, the normal bidding procedure was ignored, and seniority was not a factor. And Respondent, on brief, contends that

> Beltway's system for replacing the strikers operated in a nondiscriminatory, random manner that only fortuitously resulted in the displacement of two active union supporters because their prestrike run were selected, without management participation or influence, by replacement drivers . . . .

Respondent also contends that on the morning of August 9, 1991, Wenger informed the nonstriking utility drivers that they would be permanently assigned to a run left open by the strikers and the utility drivers accepted the offer before leaving on their runs, with the understanding that Wenger would provide a list and they would be able to bid on the open runs according to seniority; that when the Union requested reinstatement several hours later, the permanent replacement of the involved strikers had been effected, except for the ministerial task of selecting a run on the appropriate form; that Wenger provided the lists to three of the replacement drivers on the evening of August 9, 1991, and on August 10, 1991, to the fourth; that Wenger did not attempt to influence the former utility drivers' choice of runs; and that the utility driver position which Williams and Johnson were given after the strike were substantially equivalent to the positions they held before the strike.

The Board in *Solar Turbines*, 302 NLRB 14 at 14 (1991), stated as follows:

> Job vacancies created by striking employees are considered to be filled by permanent replacements as of the time the putative replacements accept an employer's offers of permanent employment in the strikers' jobs. *Home Insulation Service*, 255 NLRB 311, 312 fn. 9 (1981), enfd. mem. 665 F.2d 352 (11th Cir. 1981). The Board normally regards the employer's hiring commitment as effectuating the permanent replacement of a striker even though the striker may request reinstatement before the replacement actually begins to work. *H. & F. Binch Co.*, 188 NLRB 720, 723 (1971), enfd. as modified 456 F.2d 357 (2d Cir. 1972); *Anderson, Clayton & Co.*, 120 NLRB 1208, 1214 (1958); see also *Superior National Bank*, 246 NLRB 721 (1979). Thus, determination of the replacement date turns on when a commitment to hire an employee for a permanent job was made and accepted. [Footnote omitted.]

That Respondent transferred swing drivers to regular runs as opposed to hiring replacements to drive the regular runs normally handled by strikers does not change the situation. In either situation it comes down to a question of whether the Employer made an offer which was accepted before the Union made an unconditional offer to return to work.

At the outset of the trial (Tr. 77), Williams testified that, with Jenkins' knowledge, he, Williams, recorded, on audio tape, a statement of Jenkins that ''Wenger called him [Jenkins] up on Saturday [August 10, 1991] and *told* . . . [him, Jenkins, that] he would now have the Passport run, which . . . [was Williams' run before the strike].'' (Emphasis added.) Respondent's counsel, after indicating on the record that he listened to the tape, cross-examined Williams on it.

Subsequently, Respondent's counsel conducted the following examination of Wenger:

> Q. Now, did you subsequently communicate to the non-striking utility drivers your decision that they would be offered permanent open runs?
>
> A. Yes, we did.
>
> Q. When did you talk to them?

support of the Union. Azam testified that he knew that Williams and Johnson were leaders for the Union during the strike and after the strike he never saw them again.

[37] Bell passed away in September 1992. Bell's biannual physical exam expired March 9, 1992, and he was not reexamined, and his periodic drug test expired March 9, 1992, and it was not readministered. Wenger testified that he no longer considered Bell an employee after January 1992 because of his health. Freeman testified that he last worked at Respondent in May 1992. Wenger testified that Freeman, since his layoff in August 1991, worked 1 day in roughly June 1992.

[38] The Federal withholding forms, W-4s, for Bell and Rosetta were introduced, R. Exhs. 44 and 45, respectively.

[39] Suhana testified that he spoke to Wenger both before and after the petition about his, Suhana's, feelings about the Union and he asked Wenger if there was a way to get out of it. Wenger told Suhana that the drivers could sign a petition. According to Suhana's testimony, Wenger did not indicate that the employees had to wait a year or that they should go to the Board.

A. On the morning of August 9th.
Q. Was this before they went out on a run?
A. Yes, it is.
Q. What was said to the non-striking drivers—
THE WITNESS: . . . they were told that they were going to be offered the runs left open by the strikers, that I was going to give them a list of those runs, and that they would be able to bid on them according to seniority.
. . . .
Q. Let's take them one at a time. (Pause.)
What did Jesse Benton say to you on the morning of August 9 when you told him that he could be permanently assigned to an open run of his choice?
MR. BEINS: I object.
JUDGE WEST: Grounds?
MR. BEINS: It is hearsay.
JUDGE WEST: Is it being offered for the truth of the matter asserted?
MR. KAHN: No.
JUDGE WEST: Proceed.
THE WITNESS: He said, fine, that he would look forward to it.
By Mr. Kahn:
Q. What was the response, if any, of Kenny Hall?
A. The same.
Q. And in Jenkins?
A. And the same.
Q. And in James Newman?
A. And the same.

Did Respondent call the four utility drivers to corroborate Wenger on this most important point, especially since the statement Jenkins made on tape was already a matter of record? Respondent called two of the utility drivers, Benton and James Newman, but they were called by Respondent only to testify about the decertification petition and surrounding circumstances. When, on cross-examination, counsel for the General Counsel asked Benton, the first of these two witnesses called by Respondent, about the form Benton allegedly signed on August 9, 1991, to choose a regular contract route (G.C. Exh. 9), counsel for Respondent objected arguing that this went beyond the scope of direct.

According to Wenger's testimony, the four involved utility drivers verbally accepted the offer on the morning of August 9, 1991, three of the four completed the bid sheets that evening and the fourth, James Newman, completed his bid sheet the following day, August 10, 1991.

Benton did not testify that he accepted the offer on the morning of August 9, 1991, and then signed the bid sheet that evening around 6 p.m. Rather, he testified that Friday morning, August 9, 1991, when he was coming in Jenkins told him to go in and pick a run and he went to Wenger's office and signed the bid sheet; that he was certain that he signed the bid sheet that morning; that that day he drove the Poplar run; that he returned to Respondent's office at the end of that day; that he thought that Wenger was gone; that he was sure that he signed the bid sheet on Friday morning; that he did not work on that Saturday; that he was certain that he did not sign the bid sheet on Friday night; and that he worked the following Monday. According to Respondent's records, Benton did not drive the IRS Poplar run on August 9, 1991 (G.C. Exh. 8); his name appears alongside the NRC (N) and Briggs Chaney 6:45A runs. Benton did drive the Poplar run on Monday, August 12, 1991. Perhaps he signed the bid sheet on that Monday. Or perhaps he signed the bid sheet on Saturday, August 10, 1991. Jenkins stated on the tape that Wenger called him on Saturday, August 10, 1991, and told him that he would now have the Passport run. Perhaps, albeit he did not work that Saturday, Benton did go to Respondent's facility. Hall testified that he saw Benton and his son at Respondent's facility that Saturday. In the final analysis, Benton does not corroborate Wenger that there was an oral offer and acceptance on the morning of August 9, 1991, and at about 6 p.m. that day Benton signed the involved bid sheet. Benton's testimony contradicts Wenger's testimony.

James Newman does not corroborate Wenger either. Newman testified that in the middle of the week after the strike he signed the involved bid sheet; and ''[t]here wasn't any real conversation. It was just that these routes were open to take a bid on and of course I choose Tech World.'' Newman conceded that it was possible that he was at Respondent's on Saturday, August 10, 1991.

Hall, who was called by the General Counsel, does not corroborate Wenger on this issue. According to Hall's testimony, he was not even at Respondent's facility on August 9, 1991. There was no expressed reason for Hall to be at Respondent's facility on August 9, 1991. He did not come in on August 8, 1991, when he drove one of the NRC runs. He drove the same NRC run on August 9, 1991. If Hall was not at Respondent's facility on August 9, 1991, obviously he could not have been there to verbally accept Wenger's offer. If Hall was not at Respondent's facility on August 9, 1991, obviously he could not have signed the bid sheet at 6 p.m. at the facility on that date. Respondent contends that the selection of routes was not influenced by management. Regarding Hall, all of the evidence of record points to just the opposite. Both verbal and documentary evidence introduced here indicates that Hall did not want to give up a NRC run and even after Respondent forced him to give it up, Hall attempted to get a NRC run. Hall is credited. He first learned of the openings from Respondent's management on Saturday August 10, 1991. Hall signed the bid sheet on Saturday August 10, 1991. Hall did not write ''IRS WILSON'' on the line in the sentence ''I WOULD LIKE TO BE PERMANENTLY ASSIGNED TO THE _____ RUN.'' A comparison with the acknowledged Wenger handwriting on Respondent's Exhibit 26 demonstrates that Wenger filled in the blank in this sentence on Hall's bid sheet, along with the three other involved bid sheets. Once again Wenger's testimony is contradicted and not corroborated.[40]

Jenkins was not called as a witness. Consequently, evidence of record that he was told on Saturday, August 10, 1991, by Wenger that he, Jenkins, would now have the Passport run is not rebutted. Accordingly, contrary to the testimony of Wenger, it appears that Jenkins did not accept Wenger's offer on the morning of August 9, 1991, Jenkins did not sign his involved bid sheet at about 6 p.m. on August 9, 1991, and Jenkins did not choose the route to which he

[40] Consideration has been given to Respondent's contention that Hall may be a biased witness because Respondent fired him. As noted above, Hall impressed me as being a credible witness.

was assigned. Contrary to the assertions of Respondent, the replacement of the most active union supporters was purposeful discrimination; it did not result fortuitously without management participation or influence. I do not credit Wenger's testimony that there were offers and acceptances before the Union made its unconditional offer to return. I do not credit Wenger's testimony that he did not play a role in which routes were designated on General Counsel's Exhibits 9, 10, 11, and 12, especially General Counsel's Exhibits 10 and 11, which were formerly Johnson's and Williams' routes, respectively. Clearly a utility driver position is not substantially equivalent to a regular contract route since the utility driver is not assured work every day.[41] Respondent violated the Act as alleged in this paragraph of the complaint.

Paragraph 10 of the complaint, as indicated above, was amended at the hearing here to allege that on or about September 10, 1991, Respondent unlawfully discharged Williams and Johnson. On brief, the General Counsel contends that but for their abrupt demotion and replacement, none of the questions about availability of Johnson or Williams for work in early September would ever have arisen and, therefore, they are beside the point and that after intermittent assignments which did not provide a living wage, Williams and Johnson were obliged to look for what other work they could find. The Charging Party, argues on brief, that the Respondent constructively discharged Williams and Johnson. And Respondent, on brief, contends that it did not violate the Act by terminating Williams and Johnson in light of their poststrike violations of the Company's attendance policies and their prestrike histories of attendance-related infractions for which they had been repeatedly warned. Both Williams and Johnson engaged in deceptions which they perpetuated here with the former testifying that he was ill in early September 1991 when in fact he was working elsewhere and the latter testifying that during the same period he took a leave of absence from Respondent yet he called in to Respondent to see if there was any work. This conduct, however, was the direct result of Respondent's unlawful action of not reinstating Williams and Johnson to the positions they held before the strike. Respondent unlawfully created a situation and then took advantage of the situation it created and terminated Williams and Johnson. The two involved employees could not earn a living wage at Respondent after their return from the strike. Respondent argues that it was the fault of the two employees. Respondent introduced an exhibit, however, which demonstrated that Williams apparently had no trouble earning a living wage while he worked during a portion of this period for Otig Eastern Service, Inc. (R. Exh. 39). The terminations were unlawful. It was a continuation of the unlawful discrimination engaged in by unlawfully refusing to reinstate Williams and Johnson to their prestrike positions. In my opinion, but for Williams' and Johnson's union activity, Respondent would not have taken the action it did. It again violated the Act.

Paragraphs 12 and 13 of the amended complaint allege that on April 1, 1992, Respondent unlawfully withdrew its recognition of the Union and since that date Respondent has refused to recognize and bargain with the Union. On brief, the General Counsel contends that the only plausible support for the Respondent's withdrawal of recognition, the November 1991 petition, was tainted both by the unfair labor practices which preceded it, which unfair labor practices preclude a good-faith doubt defense or a defense of actual loss of majority, and by Respondent's encouragement as the petition was being conceived and signatures were gathered. The Charging Party, on brief, argues that Respondent aimed to and indeed did in fact destroy the Union by destroying the employment rights of Williams and Johnson; and that the decertification petition, which was the product of the Respondent's illegalities, occurred within 3 months of the Respondent's blatantly replacing the union strike leaders and simultaneously notifying the other employees of this fact in writing. On brief, Respondent contends that a petition signed by a majority of employees in which they indicate that they do not wish to be represented by the Union ordinarily constitutes sufficient objective evidence to rebut the Union's presumed majority status; that with such petition the burden shifts to the General Counsel to show that on the critical date the Union either represented a majority of employees or its loss of majority support was attributable to the Employer's misconduct; that on April 1, 1992, the bargaining unit consisted of 28 employees,[42] including Bell and Freeman (but excluding Williams and Johnson); that recall from layoff by Bell and Freeman was reasonably expected as of April 1, 1992, and, therefore, they may properly be considered as part of the unit as of that date; that a majority, 16 (excluding Hall because he had been terminated), signed the petition; that a majority of the unit employees testified that the alleged unfair labor practices did not influence their decision to sign the petition; that at most, the Respondent committed a ''technical'' violation in refusing to reinstate Williams, Johnson, and Randall to their prestrike positions; that the Respondent's August 12, 1991 letter did not announce generally to the employees that Williams, Johnson, and Randall had been permanently replaced in their prestrike jobs since it did not refer to them by name; that although the Union requested a resumption of negotiations shortly before the withdrawal of recognition, the fact remains that nearly 8 months had passed between the last negotiation meeting on August 26, 1991, and the Union's belated request; and that while Woodward testified that he repeatedly attempted to contact the Company's outside bargaining representative, Herbert Larrabee, after August 26, 1991, to request resumption of bargaining, Davis, Wenger, and Deiso testified that the Union was not in contact with the Company.[43]

[41] Respondent's argument that it went ahead with the replacements because it did not believe Woodward's unconditional offer to return has no merit. And Davis' argument that he doubted Woodward's offer because it was not in writing has no merit here because Wenger never denied Woodward's testimony that he was told by Wenger that it was not necessary. Also, since Respondent's management takes the position that it did not believe Woodward, it does not appear that it would have made a difference if Woodward's offer was in writing.

[42] Hall was not included because he had been terminated in March 1992.

[43] With respect to Respondent's contentions, it is noted that Larrabee did not testify and, therefore, Woodward's testimony is not rebutted by Larrabee; that in light of the above findings, Williams and Johnson should have been included in the unit; that Wenger properly struck the names of Bell and Freeman from the petition; that it is clearly not proper to now argue that Bell should be in-

Continued

The Board, in *Fabric Warehouse*, 294 NLRB 189 (1989), stated as follows:

> It is well established that, where an employer has engaged in unlawful conduct tending to undercut its employees' support for their bargaining representative, the employer cannot rely on any resulting expression of disaffection by its employees because its asserted doubt of the union's majority status has been raised in the context of its own unfair labor practices directed at causing such employee disaffection. *Hearst Corp*., 281 NLRB 764 (1986), affd. mem. 837 F.2d 1088 (5th Cir. 1988). Further, such misconduct will bar any reliance on a tainted decertification petition even though a majority of the petition signers profess ignorance of their employer's misconduct. Id at 765.

Here, as found above, Respondent, on the employees' return from the involved strike, unlawfully refused to reinstate approximately 10 percent of the members of the involved unit to the positions they held before the strike. Those who were refused reinstatement were the strike leaders. While Respondent's August 12, 1991 memorandum does not specifically name the three, in a unit this small undoubtedly many of the employees in the unit knew who was involved. Two of the three were subsequently terminated. Wenger testified that it was common knowledge among the employees that Johnson and Williams were leaders for the Union and he, Wenger, suspected that it was common knowledge among the employees that Williams and Johnson were replaced. Azam testified that he knew that Williams and Johnson were leaders for the Union during the strike and after the strike he never saw them again. Respondent engaged in conduct designed to undermine its employees' support for the Union and aimed at causing them to circulate a decertification petition. Respondent cannot rely on the results of its unlawful conduct to justify its withdrawal of recognition from the Union and its later refusal to bargain. Respondent violated the Act as alleged on April 1, 1992, by withdrawing recognition from the Union and by refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit.

As amended at the hearing here, paragraph 14(a) of the amended complaint alleges that on June 18, 1991, in an office at Respondent's facility, the Respondent, by its supervisor and agent Davis, referred to the Union in disparaging, abusive, and profane terms in the presence of members of the unit. The General Counsel, on brief, contends that one of Williams' affidavits (R. Exh. 1) precisely dates the incident as June 18, 1991. Respondent, on brief, argues that Davis' alleged remark that he, rather than the Union, ran the Company accurately reflected the law and at worst constituted an expression of rather mild disapproval of the Union and was fully protected by the free speech provisions of Section 8(c) of the Act; and that even if this allegation is factually supported, such allegation is foreclosed by the National Labor Relations Board's (the Board) recent decision in *Sears, Roebuck & Co*., 305 NLRB 193 (1991). According to paragraph 18 of Williams' July 3, 1991 affidavit (R. Exh. 1), Davis said that he owned the premises. According to Williams' testimony, Davis said that he and not the Union owned the place. Such statements do not violate Section 8(a)(1) of the Act. They are not coercive of employees' Section 7 rights. Respondent did not violate that Act as alleged in this paragraph of the amended complaint. This allegation is dismissed.

As amended at the hearing here, paragraph 14(b) of the amended complaint alleges that on September 12, 1991, the Respondent, by its supervisors and agents Davis and Deiso, engaged in surveillance of employees at or near the residence of one of the employees. On brief, the General Counsel contends that the overwhelming likelihood is that the two officials were in quest of ammunition to fire Williams. Respondent, on brief, argues that surveillance was unrelated to the employees' union activities and were neither designed to, nor reasonably could be deemed to have the effect of, discouraging support of the Union; that absent evidence that Davis and Deiso were spying on union activities, or on union supporters on account of their support of the Union, the essential elements of a surveillance claim cannot be established, *Hoyt Water Heater Co*., 282 NLRB 1348 (1987); and that Respondent was entitled to confirm whether Williams and Johnson intended to remain employed at Beltway. When Respondent's management telephoned Williams' home during his normal working hours at Respondent in September 1991, they were told that Williams was working. Williams was an employee of Respondent at the time, but he was not showing up for work at Respondent's facility. Williams had not told Respondent that he was working elsewhere. Respondent's surveillance had nothing to do with union activity. Rather, it dealt with Williams' employment status. This conduct was not coercive of employees' Section 7 rights. Respondent did not violate the Act as alleged in this paragraph of the amended complaint. Accordingly, this allegation is dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged on commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By unlawfully failing and refusing to reinstate Jimmy Williams, David Johnson, and Thaddeus Randall on August 12, 1991, to their former positions of employment and by unlawfully discharging Williams and Johnson on or about September 10, 1991, Respondent violated Section 8(a)(1) and (3) of the Act.

4. By withdrawing its recognition of the Union on April 1, 1992, and by refusing since then to recognize and bargain with the Union as the exclusive collective-bargaining representative of the following unit, Respondent violated Section 8(a)(1) and (5) of the Act:

> All drivers, maintenance men and fleet maintenance chiefs employed by the Employer; but excluding all of-

cluded on the petition as of April 1, 1992, when Wenger testified that Bell was to ill from January 1992 until his death to drive one of Respondent's vehicles; that as of April 1, 1992, Freeman did not have a reasonable expectation of recall; that excluding Bell, Freeman, and Hall from the petition, 14 of 28 employees signed the petition; and that obviously 14 of 28 is not a majority; that since Rosetta did not testify here, only 13 of the 28 testified with respect to (1) what they considered when they signed the petition and (2) whether they changed their minds by April 1, 1992.

fice clericals, professionals, and guards and supervisors as defined by the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. Respondent has not committed any other unfair labor practices alleged in the amended complaint.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that Respondent be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purpose of the Act.

Having found that Respondent unlawfully refused to reinstate economic strikers Jimmy Williams, David Johnson, and Thaddeus Randall on August 12, 1991, following the Union's August 9, 1991 unconditional offer on their behalf to return to work, I shall order the Respondent to offer these employees immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges. In order to make room for them, the Respondent shall dismiss, if necessary, any persons hired to replace them after the strike terminated on August 9, 1991, or it shall demote any utility driver promoted to replace them after the strike terminated. Further it shall be ordered that Respondent make whole these employees for any loss of earnings and other benefits they may have incurred by reason of the Respondent's discrimination against them, including backpay from August 12, 1991. Backpay, with interest, shall be computed in the manner set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Having found that Respondent unlawfully withdrew its recognition from the Union and refused to recognize and bargain with the Union, it shall be ordered that Respondent, on request, bargain with the Union as the exclusive collective-bargaining representative of the appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[44]

ORDER

The Respondent, D & D Enterprises, Inc. d/b/a Beltway Transportation Company, Forrestville, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully failing and refusing to reinstate Jimmy Williams, David Johnson, and Thaddeus Randall to the positions of employment they held before the economic strike which ended August 9, 1991, and unlawfully discharging Williams and Johnson.

(b) Withdrawing and withholding recognition from and refusing to bargain with the International Brotherhood of Teamsters, Local Union No. 639, AFL–CIO as the exclusive collective-bargaining representative of the following appropriate unit:

> All drivers, maintenance men and fleet maintenance chiefs employed by the Employer; but excluding all office clericals, professionals, and guards and supervisors as defined by the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Jimmy Williams, David Johnson, and Thaddeus Randall immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and in order to make room for them, the Respondent shall dismiss, if necessary, any persons hired to replace them after the strike terminated on August 9, 1991, or it shall demote any utility driver promoted to replace them after the strike terminated, and Respondent shall make whole these employees for any loss of earnings and other benefits they may have incurred by reason of the Respondent's discrimination against them, including backpay from August 12, 1991, in the manner and to the extent set forth in the remedy section of the decision.

(b) On request, bargain with the International Brotherhood of Teamsters, Local Union No. 639, AFL–CIO as the exclusive collective-bargaining representative of the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Remove from its files any reference to the unlawful discharges and notify Jimmy Williams and David Johnson that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Forrestville, Maryland facility copies of the attached notice marked ''Appendix.''[45] Copies of the notice, on forms provided by the Regional Director for Region 5 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[44] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[45] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge you or otherwise discriminate in regard to your reinstatement, hire, or tenure of employment or any term or condition of employment to discourage union activity.

WE WILL NOT withdraw and withhold recognition from and refuse to bargain with the International Brotherhood of Teamsters, Local Union No. 639, AFL–CIO as the exclusive collective-bargaining representative of the following appropriate unit:

> All drivers, maintenance men and fleet maintenance chiefs employed by the Employer; but excluding all office clericals, professionals, and guards and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Jimmy Williams, David Johnson, and Thaddeus Randall immediate and full reinstatement to the positions that they held at the time they went on strike or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges, and in order to make room for them, WE WILL dismiss, if necessary, any persons hired to replace them after the strike terminated on August 9, 1991, or WE WILL demote any utility driver promoted to replace them after the strike terminated, and WE WILL make whole these employees for any loss of earnings and other benefits they may have incurred by reason of our discrimination against them, including backpay, plus interest, from August 12, 1991.

WE WILL, on request, bargain with the International Brotherhood of Teamsters, Local Union No. 639, AFL–CIO as the exclusive collective-bargaining representative of the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL notify Jimmy Williams and David Johnson that we have removed from our files any reference to their discharges and that the discharges will not be used against them in any way.

D & D ENTERPRISES, INC. D/B/A BELTWAY TRANSPORTATION COMPANY